WATTA BATTERY INDUSTRIES SDN. BHD.

v.

UNI-BATT MANUFACTURING SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[ORIGINATING SUMMONS NO. D4-24-180 OF 1989]
2 NOVEMBER 1989

COMPANY LAW: *Winding-up - Statutory notice - Section 218 - Application to restrain - Whether debt due and owing - Whether bona fide dispute - Existence of credit arrangement.*

This was the plaintiff's application to restrain the defendant from filing a winding-up petition pursuant to the non-compliance of a statutory notice under s. 218 of the Companies Act. The plaintiff disputed the entire debt and also asserted that as at the date of the notice there was no debt due and owing as there was a 90 days credit arrangement which had not expired. The plaintiff adduced affidavit evidence and exhibited minutes of a board meeting of the defendant which confirmed the existence of the 90 days credit arrangement.

Held:

[1] There was a *bona fide* dispute based on the 90 days credit arrangement.

[2] When a creditor issues a notice under the Companies Act demanding payment for a sum of money and notifying that winding-up proceedings will be taken against the company in the event payment is not made within a prescribed time, then the company may apply to the Court to restrain the creditor from taking further steps in the winding-up proceedings provided that the debtor disputes the debt.

[Order accordingly.]

Cases referred to:

Re Rostman Provincial Cinemas Ltd. 108 SJ 581
Bina Satu Sdn. Bhd. v. Tan Construction [1988] 1 CLJ (Rep) 384
Chip Yew Brick Works Sdn. Bhd. v. Chang Heer Enterprise Sdn. Bhd. [1988] 1 CLJ (Rep) 5

Legislation referred to:

Companies Act 1965, s. 218
Special Relief Act 1950, s. 54(a),(b)

For the plaintiff - Yusuf Khan bin Ghows Khan; M/s. Yusuf Lee Pathma & Marbeck
For the defendant - Ong Ban Chai; M/s. Ong Ban Chai & Co.

JUDGMENT

Zakaria Yatim J:

This is an application by the plaintiff for (a) a declaration that the notice dated 28 April 1989 issued by the solicitors for the defendant pursuant to s. 218 of the Companies Act 1965 is void and of no effect; (b) the said notice be set aside; and (c) the defendant be restrained from filing a winding-up petition against the plaintiff or taking any steps to wind-up the plaintiff until and unless the defendant obtains a judgment from the Court or unless this Court otherwise orders; and (d) costs.

Encik Yusuf Khan, Counsel for the plaintiff abandoned prayers (a) and (b) and decided to proceed on prayer (c) only. He contended that the amount as stated in the notice was not correct as on that date there was no outstanding debt due from the plaintiff to the defendant.

According to him there was a ninety days credit arrangement between the plaintiff and the defendant and the ninety days period had not expired on the date of the notice. In his affidavit, the plaintiff averred that as at 28 April 1989 there was no outstanding debt due to the plaintiff. The plaintiff also averred that there was still ninety days credit for February, March and April payments due on 1 June 1989 and 31 July 1989 respectively.

There is no written agreement between the plaintiff and the defendant on the ninety days credit arrangement. Encik Yusuf Khan referred to the minutes of the directors meeting of the defendant held on 6 November 1985 which was exhibited to the affidavit of the plaintiff affirmed on 12 June 1989. Paragraph 8 of the minutes states:

> The Board was informed that the normal circumstance of 90 days order period was also enjoyed by the 3 other shareholders. In view of the tight monetary situation, the 3 shareholders were to settle all debts even though not exceeding 90 days. In the event of further shortage of funds, then the shareholders have to inject money in the form of loan in pro rate to shareholders.

According to Encik Yusuf Khan the said minutes confirmed the existence of the ninety days credit arrangement.

The plaintiff, in its affidavit did not deny the existence of para. 8 of the minutes of the directors meeting but averred that in normal circumstances the ninety days credit arrangement did not apply to the debt owning by the plaintiff to the defendant. The relevant point of the said affidavit is quoted below:

> 10 Furthermore, the said resolution minuted as follows:
>
> > the **normal circumstances** of 90 days order period was also enjoyed by the 3 other shareholders. In view of the **tight monetary situation** the 3 shareholders **were to settle all debt even though not exceeding 90 days**.
>
> 11 The monetary situation of the defendants remain tight and the 90 days credit terms in normal circumstances does not apply to the debt owning by the plaintiffs to the defendants. In the circumstances, I deny para. 9 of the affidavit of Teoh.

It is clear that para. 8 of the minutes of the directors meeting and para. 10 of the plaintiff's affidavit confirmed the existence of the ninety days credit arrangement between the plaintiff and the defendant. It is not clear whether the arrangement was made orally between the parties. Even if it was a verbal arrangement, the Court can rely on it in view of the decision of the majority of the Court of Appeal in England in *re Rostman Provincial Cinemas Ltd*. 108 SJ 581.

In my view the plaintiff is not only disputing the entire debt claimed by the defendant as specified in the notice, but also asserting that there was no debt due as at 28 April 1989, that is the date of the notice. This is a *bona fide* dispute based on the ninety days credit arrangement.

Mr. Ong Ban Chai submitted that the plaintiff is not entitled to an order restraining the defendant from filing a winding-up petition against the plaintiff. He relied on s. 54(a) and (b) of the Special Relief Act 1950. In my opinion the provisions in the Specific Relief Act referred to by Mr. Ong Ban Chai do not apply in the present case. Firstly, prayer (c) is not to stay a judicial proceeding pending at the institution of a suit. Secondly, in prayer (c) the plaintiff is asking for an interim injuction and not a perpetual injunction. See *Bina Satu Sdn. Bhd. v. Tan Construction* [1988] 1 CLJ (Rep) 384.

When a creditor issues a notice under the Companies Act demanding payment for a sum of money and notifying the action for the winding-up of respondent company will be taken in the event payment is not made within a prescribed time may apply to the Court for an order restraining the creditor for taking further steps in the winding-up proceeding provided that the respondent company disputes the debt. See the decision of the Supreme Court in *Chip Yew Brick Works Sdn. Bhd. v. Chang Heer Enterprise Sdn. Bhd*. [1988] 1 CLJ (Rep) 5.

For the reasons I have just stated, I order that the defendant be restrained from filing a winding-up petition against the plaintiff until further order subject to the usual undertaking as to damages. The costs of this application is costs in the cause.

Also found at [1990] 1 CLJ 578